

Small Business Administration

§ 115.10

SBA should provide representational assistance for such an employee, those attorneys undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. If representation is authorized, SBA attorneys who assist in the representation of an SBA employee also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. Unless authorized by the employee, the attorney must not disclose to anyone other than attorneys also responsible for the employee's representation information communicated to the attorney by the client-employee during the course of the attorney-client relationship. The attorney-client privilege will continue with respect to that information whether or not representation is provided, and even if the employee's representation is denied or discontinued.

PART 115—SURETY BOND GUARANTEE

- Sec.
115.1 Overview of regulations.
115.2 Savings clause.

Subpart A—Provisions for All Surety Bond Guarantees

- 115.10 Definitions.
115.11 Applying to participate in the Surety Bond Guarantee Program.
115.12 General program policies and provisions.
115.13 Eligibility of Principal.
115.14 Loss of Principal's eligibility for future assistance.
115.15 Underwriting and servicing standards.
115.16 Determination of Surety's Loss.
115.17 Minimization of Surety's Loss.
115.18 Refusal to issue further guarantees; suspension and termination of PSB status.
115.19 Denial of liability.
115.20 Insolvency of Surety.
115.21 Audits and investigations.

Subpart B—Guarantees Subject to Prior Approval

- 115.30 Submission of Surety's guarantee application.
115.31 Guarantee percentage.
115.32 Fees and Premiums.
115.33 Surety bonding line.
115.34 Minimization of Surety's Loss.

- 115.35 Claims for reimbursement of Losses.
115.36 Indemnity settlements and reinstatement of Principal.

Subpart C—Preferred Surety Bond (PSB) Guarantees

- 115.60 Selection and admission of PSB Sureties.
115.61 [Reserved]
115.62 Prohibition on participation in Prior Approval program.
115.63 Allotment of guarantee authority.
115.64 Timeliness requirement.
115.65 General PSB procedures.
115.66 Fees.
115.67 Changes in Contract or bond amount.
115.68 Guarantee percentage.
115.69 Imminent Breach.
115.70 Claims for reimbursement of Losses.
115.71 Denial of liability.

AUTHORITY: 5 U.S.C. app. 3, 15 U.S.C. 687b, 687c, 694a, 694b, 694b note, Pub. L. 106-554; and Pub. L. 108-447, Div. K, Sec. 203.

SOURCE: 61 FR 3271, Jan. 31, 1996, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 115 appear at 72 FR 50038, Aug. 30, 2007.

§ 115.1 Overview of regulations.

The regulations in this part cover the SBA's Surety Bond Guarantee Programs under Part B of Title IV of the Small Business Investment Act of 1958, as amended. Subpart A of this part contains regulations common to both the program requiring prior SBA approval of each bond guarantee (the Prior Approval Program) and the program not requiring prior approval (the PSB Program). Subpart B of this part contains the regulations applicable only to the Prior Approval Program. Subpart C of this part contains the regulations applicable only to the PSB Program.

§ 115.2 Savings clause.

Transactions affected by this part 115 are governed by the regulations in effect at the time they occur.

Subpart A—Provisions for All Surety Bond Guarantees

§ 115.10 Definitions.

Affiliate is defined in part 121 of this chapter.

Ancillary Bond means a bond incidental and essential to the performance of a Contract for which there is a guaranteed Final Bond.

Applicable Statutory Limit means the maximum amount of any Contract, or Order, for which Section 411(a) of the Small Business Investment Act, as amended from time to time, authorizes the SBA to guarantee, or commit to guarantee, a Bid Bond, Payment Bond, Performance Bond, or Ancillary Bond. The Applicable Statutory Limit from February 17, 2009 through September 30, 2010, is \$5,000,000; provided, however, that during this period the Applicable Statutory Limit is \$10,000,000 for a particular Contract or Order if a contracting officer of a Federal agency certifies in writing that a guarantee in excess of \$5,000,000 is necessary.

Bid Bond means a bond conditioned upon the bidder on a Contract entering into the Contract, and furnishing the required Payment and Performance Bonds. The term does not include a forfeiture bond unless it is issued for a jurisdiction where statute or settled decisional law requires forfeiture bonds for public works.

Contract means a written obligation of the Principal, including an Order, requiring the furnishing of services, supplies, labor, materials, machinery, equipment, or construction. A Contract must not prohibit a Surety from performing the Contract upon default of the Principal. A Contract does not include a permit, subdivision contract, lease, land contract, evidence of debt, financial guarantee (e.g., a contract requiring any payment by the Principal to the Oblige), warranty of performance or efficiency, warranty of fidelity, or release of lien (other than for claims under a guaranteed bond). It includes a maintenance agreement of 2 years or less which covers defective workmanship or materials only. With SBA's written approval, it can also include a longer maintenance agreement covering defective workmanship or materials, or a maintenance agreement covering something other than defective workmanship or materials. To qualify for such approval, the agreement must be ancillary to the Contract for which SBA is guaranteeing a bond, must be required to be performed by the same

Principal, and must be customarily required in the relevant trade or industry.

D/SG means SBA's Director, Office of Surety Guarantees.

Execution means signing by a representative or agent of the Surety with the authority and power to bind the Surety.

Final Bond means a Performance Bond and/or a Payment Bond.

Imminent Breach means a threat to the successful completion of a bonded Contract which, unless remedied by the Surety, makes a default under the bond appear to be inevitable.

Investment Act means the Small Business Investment Act of 1958 (15 U.S.C. 661 *et seq.*), as amended.

Loss has the meaning set forth in § 115.16.

Obligee means:

(1)(i) In the case of a Bid Bond, the Person requesting bids for the performance of a Contract; or

(ii) In the case of a Final Bond, the Person who has contracted with a Principal for the completion of the Contract and to whom the primary obligation of the Surety runs in the event of a breach by the Principal.

(2) In either case, no Person (other than a Federal department or agency) may be named co-Obligee or Oblige on a bond or on a rider to the bond unless that Person is bound by the Contract to the Principal (or to the Surety, if the Surety has arranged completion of the Contract) to the same extent as the original Oblige. In no event may the addition of one or more co-Obligees increase the aggregate liability of the Surety under the bond.

Order means a task order for services or delivery order for supplies issued under an indefinite delivery Contract (definite quantity, indefinite quantity, or requirements).

OSG means SBA's Office of Surety Guarantees.

Payment Bond means a bond which is conditioned upon the payment by the Principal of money to persons who have a right of action against such bond, including those who have furnished labor, materials, equipment and supplies for use in the performance of the Contract. A Payment Bond can not require the Surety to pay an amount

Small Business Administration

§ 115.11

which exceeds the claimant's actual loss or damage.

Performance Bond means a bond conditioned upon the completion by the Principal of a Contract in accordance with its terms.

Person means a natural person or a legal entity.

Premium means the amount charged by a Surety to issue bonds. The Premium is determined by applying an approved rate (see §§ 115.32(a) and 115.60(a)(2)) to the bond or contract amount. The Premium does not include surcharges for extra services, whether or not considered part of the "premium" under local law.

Principal means, in the case of a Bid Bond, the Person bidding for the award of a Contract. In the case of Final Bonds and Ancillary Bonds, Principal means the Person primarily liable to complete the Contract, or to make Contract-related payments to other persons, and is the Person whose performance or payment is bonded by the Surety. A Principal may be a prime contractor or a subcontractor.

Prior Approval Agreement means the Surety Bond Guarantee Agreement (SBA Form 990) entered into between a Prior Approval Surety and SBA under which SBA agrees to guarantee a specific bond.

Prior Approval Surety means a Surety which must obtain SBA's prior approval on each guarantee and which has entered into one or more Prior Approval Agreements with SBA.

PSB Agreement means the Preferred Surety Bond Guarantee Agreement entered into between a PSB Surety and SBA.

PSB Surety means a Surety that has been admitted to the Preferred Surety Bond (PSB) Program.

Service-Disabled Veteran means a veteran with a disability that is service-connected, as defined in Section 101(16) of Title 38, United States Code.

Small Business Owned and Controlled by Service-Disabled Veterans means:

(1) A Small Concern of which not less than 51 percent is owned by one or more Service-Disabled Veterans; or a publicly-owned Small concern of which not less than 51 percent of the stock is owned by one or more Service-Disabled Veterans; and

(2) The management and daily business operations of which are controlled by one or more Service-Disabled Veterans, or in the case of a Service-Disabled Veteran with permanent and severe disability, the spouse or permanent caregiver of such Veteran.

Small Business Owned and Controlled by Veterans means:

(1) A Small Concern of which not less than 51 percent is owned by one or more Veterans; or a publicly-owned Small Concern of which not less than 51 percent of the stock is owned by one or more Veterans; and

(2) The management and daily business operations of which are controlled by one or more Veterans.

Surety means a company which:

(1)(i) Under the terms of a Bid Bond, agrees to pay a sum of money to the Oblige if the Principal breaches the conditions of the bond;

(ii) Under the terms of a Performance Bond, agrees to pay a sum of money or to incur the cost of fulfilling the terms of a Contract if the Principal breaches the conditions of the Contract; and

(iii) Under the terms of a Payment or an Ancillary Bond, agrees to make payment to all who have a right of action against such bond, including those who have furnished labor, materials, equipment and supplies in the performance of the Contract.

(2) The term Surety includes an agent, independent agent, underwriter, or any other company or individual empowered to act on behalf of the Surety.

Veteran has the meaning given the term in Section 101(2) of Title 38, United States Code.

[61 FR 3271, Jan. 31, 1996, as amended at 61 FR 7985, Mar. 1, 1996; 72 FR 34599, June 25, 2007; 72 FR 50038, Aug. 30, 2007; 74 FR 36109, July 22, 2009]

§ 115.11 Applying to participate in the Surety Bond Guarantee Program.

Sureties interested in participating as Prior Approval Sureties or PSB Sureties should apply in writing to the D/SG at 409 3rd Street, SW., Washington, DC 20416. OSG will determine the eligibility of the applicant considering its standards and procedures for underwriting, administration, claims and recovery. Each applicant must be a